87-242

Supreme Court, U.S.
FILED
AUG 3 1987
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

HENRY YARBROUGH, IN DERIVATIVE ACTION ON BEHALF OF THE PUBLIC COMPANY, LAVENDER HOUSE, INC.

Petitioner

vs.

SMALL BUSINESS ADMINISTRATION

Respondent

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(215) 557-8375
Attorney for Petitioner

QUESTIONS PRESENTED

I. Whether a Writ of Revival should stand when Petitioner due process was violated in the first instances without his knowledge.

II. Whether a Writ of Revival should stand when Shareholder Member of a drivative action was without notification pursuant to Rule 23.1., Federal Rules of Civil Procedure.

PARTIES TO THE PROCEEDING

1. The petitioner, Henry Yarbrough, on behalf of the public company, Lavender House, Inc.
2. Shareholder members of Lavender House, Inc.
3. Mr. and Mrs. Howard and Shirley Scott.

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5th Amendment, United States Constitution . . . . . .

14th Amendment, United States Constitution . . . . . .

Rule 23.1., Federal Rules of Civil Procedure . . . . . .

Title 28, Section 1254, United States Code . . . . . .

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Petitioner

vs.

SMALL BUSINESS ADMINISTRATION

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Henry Yarbrough, In derivative

Action on behalf of the public company,

Lavender House, Inc., hereby petitions that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Third Circuit Court entered on July 24, 1984.

JURISDICTION

Jurisdiction in this Court is founded under the provision of Title 28, Section 1254, United States Code.

The United States Court of Appeals for the Third Circuit affirmed the judgment of the District Court against the petitioners on July 24, 1984, is printed in the Appendix Page A-11.

A stay was granted petitioner until December 8, 1986 by the Court of Appeals on September 19, 1986, Appendix Page A-10.

FEDERAL LAWS OF THIS CASE

The Federal Laws involved herein are the Fifth Amendment, Constitution of the United States, the Fourteenth Amendment, Constitution of the United States, and Rule 23.1., Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

Henry Yarbrough entered this case on April 22, 1985 in derivative action on behalf of LAVENDER HOUSE, INC., in which he, Yarbrough, owns 9,900 shares of the Common Stock of Lavender House.

Yarbrough's arguments were that he, as a member of the derivative action and Lavender House was denied Due Process when the district court on April 28, 1980 held a civil non jury trial in which only the attorneys, Mr. Stout and Ms. Younce, for the Small Business Administration were present and gave arguments and had witnesses testify to the Court. No attorney or anyone else was present to represent the public comany Lavender House in which a damages judgment in the amount of $408,483.93 was handed down against Lavender House and in favor of

the Small Business Administration. See Docket 78-62 Page Appendix-2.

Yarbrough argued the Writ of Revival attached here at Appendix Page A-4 should not stand that an Ex Parte Trial is clearly a violation of Due Process.

Yarbrough further argues that his right as a shareholder member in the derivative action to notified under Rule 23.1, Federal Rules of Civil Procedure, was violated. Yarbrough nor any other shareholder member listed herein at Page Appendix A-13 received notification that the derivative action would be compromised.

Yarbrough's Pro Se Motion and arguments before the District Court that the Writ of Revival should not stand were denied by the Court on September 6, 1985.

On December 13, 1985, Yarbrough

appealed to the United States Court of Appeals for the Third Circuit and filed his Brief thereunder.

The Third Circuit Court denied Mr. Yarbrough's appeal on July 24, 1986.

On July 31, 1986, Counsel entered his appearance on behalf of Mr. Yarbrough.

ARGUMENT

The record in this case shows that Henry Yarbrough filed motions and a brief before the Court's below based on what he, Yarbrough, considered to be correct arguments to have a Writ of Revival against Lavender House, Inc., a public company in which he owns 9,900 common shares set aside. A copy of the Writ is attached at page Appendix A-4.

The Writ should not stand for want of Due Process for Lavender House and its public shareholders. The Docket at page Appendix-2 attached herein, Docket No. 97, shows that no attorney represented Lavender House or its shareholders. Mr. Stout and Ms. Yance, attorneys for the Small Business Administration, were the only attorneys present for the Civil non jury trial in which damages in the

total amount of $408,483.93 was awarded to the Small Business Administration and against the derivative action company Lavender House. No attorney or anyone else represented Lavender House. The District Court erred in holding a trial for the one side, a violation of constitutional protection provided for in the Fifth and Fourteenth Amendments, United States Constitution.

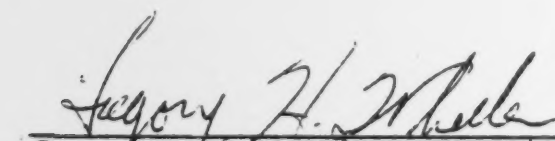
The Federal Rules of Civil Procedure at Rule 23.1., attached herein at Appendix page A-1, provides that all members in a derivative action are to be notified. Henry Yarbrough as a shareholder member of this derivative action reeived no such notification and thorough investigation has found no other shareholder who received notification. The Docket also does not show that any of the shareholder

members as listed herein received notification. The Writ of Revival should not stand. The judgment should not have been entered in the first instance.

CONCLUSION

In consideration of the facts and law above cited, Petitioner respectfully moves this Honorable Court to use its supervisory authority and issue information instruction to the Court below to review this case as provided for under Rule 23.1., FRCP, and Due Process under the Fifth Amendment, United States Constitution, or, to grant the Petition for Writ of Certiorari.

Respectfully submitted,



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Counsel for the Petitioner

A P P E N D I X

NUMBER

IN THE SUPREME COURT
OF THE
UNITED STATES

Henry Yarbrough, in derivative Action on behalf of the public company, LAVENDER HOUSE, INC.	:	
Petitioner	:	
vs.	:	October Term
SMALL BUSINESS ADMINISTRATION	:	1986
Respondent	:	

From the United States Court of Appeals
for the Third Circuit in Case No. 85-1766

APPENDIX TO PETITION FOR CERTIORARI

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(215) 557-8375

Appendix

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EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Docket 78-62

Howard Scott, in derivative Action on behalf of Lavender House, Inc., his wife Shirley & Himself

Joiner Plaintiff
Henry Yarbrough, in derivative Action on behalf of the public company LAVENDER HOUSE, INC.

vs.

Defendant
Small Business Administration

ATTORNEYS

p.p. Robert DeLuca, USA
William McGettigan, ASUA

Date	NR.	PROCEEDINGS
1980		* * *
May 5	97	Civil non jury trial on counterclaim of 4/28/80: Mr. Stout moves for Ms. Yaunce's admission pro hace vicegranted; Mr. Scott not present; S.B.A.'s witnesses sworn filed.
May 8	98	Civil non jury trial on counterclaim of 4/29/80: Ms. Yance makes closing argument; Court makes findings of fact; Court

		finds in favor of deft. on counterclaim and awards damages in total amount of $408,483.93 with interest as of 12/11/79, deft. to submit final figure showing interest to date, filed.
May 6	99	ORDER DATED 4/29/80 THAT JUDGEMENT BE ENTERED ON THE COUNTERCLAIM IN FAVOR OF SMALL BUSINESS ADMINISTRATION AND AGAINST HOWARD SCOTT, SHIRLEY SCOTT AND LAVENDER HOUSE, INC., JOINTLY AND SEVERALLY IN THE AMOUNT $416,322.79, FILED. 5/7/80 entered & copies mailed.

EXHIBIT B

VRP:lcm
File No. 8500609

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Howard Scott, in Derivative Action on behalf of Lavender House, Inc. and on behalf of his wife, Shirley and Himself	:	CIVIL
Plaintiff(s)	:	ACTION
v.	:	NO. 78-62
UNITED STATES OF AMERICA, SMALL BUSINESS ADMINISTRATION,	:	
Defendant(s)	:	

WRIT OF REVIVAL

TO: Howard Scott, Shirley Scott
and Lavender House, Inc.
Plaintiffs

(1) You are notified that defendant has commenced a proceeding to revive and continue the lien of the judgement entered to Civil Action No. 78-62, United States

Action No. 78-62, United States District Court for the Eastern District of Pennsylvania.

(2) The defendant claims that the amount due and unpaid is $416,322.79 with interest from May 7, 1980 at the rate of 6% per annum.

(3) YOU ARE REQUIRED WITHIN TWENTY (20) DAYS AFTER SERVICE OF THIS WRIT TO FILE AN ANSWER OR OTHERWISE PLEAD TO THIS WRIT. IF YOU FAIL TO DO SO JUDGEMENT OF REVIVAL WILL BE ENTERED.

SEAL OF THE COURT

CLERK, UNITED STATES DISTRICT COURT

DATE: e3/28/85

BY: s/MICHAEL OWENS
Deputy Clerk
United States
District Court

EXHIBIT C

RULE 23.1. DERIVATIVE ACTIONS BY SHAREHOLDERS, FEDERAL RULES OF CIVIL PROCEDURE, IS AS FOLLOWS:

In a derivative action brought by one or more shareholders or members to enforce a right of a corportion or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law, and (2) that the action is not a collusive one to confer jurisdiction, on a court of the United States which it would not otherwise have.

The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort.

The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association.

EXHIBIT D

UNITED STATES COURT OF APPEALS
FOR THE THIRD COURT

NOS. 85-1766 and 85-1780

HOWARD SCOTT, et al.
HANK YARBROUGH, et al.,
Appellants

v.

SMALL BUSINESS ADMINISTRATION
Appellee

(Civil No. 78-0062)

SUR PETITION FOR PANEL REHEARING

Present: ADAMS, HIGGINBOTHAM, and
MARIS, Circuit Judges

The petition for panel rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court in regular active service, and no judge who concurred in the decision

having asked for rehearing, the petition for panel rehearing is denied.

BY THE COURT,

s/Arlin M. Adams
Circuit Judge

Dated: Sept. 9, 1986

EXHIBIT E

UNITED STATES COURT OF APPEALS
FOR THE THIRD COURT

NOS. 85-1766 and 85-1780

Scott, Howard et al vs. U.S. Department of Commerce et al
Henry Yarbrough, Appellant
85-1766

Howard Scott, Appellant 85-1780

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is O R D E R E D that issuance of the certified Judgement in lieu of formal mandate in the above cause be, and it is hereby stayed until December 8, 1986.

s/Arlin M. Adams
Circuit Judge

Dated: September 19, 1986

EXHIBIT F

UNITED STATES COURT OF APPEALS
FOR THE THIRD COURT

NOS. 85-1766 and 85-1780

HOWARD SCOTT, in derivative action on behalf of Lavender House, Inc., and on behalf of his wife Shirley and Himself

v.

UNITED STATES DEPARTMENT OF COMMERCE and SMALL BUSINESS ADMINISTRATION

Howard Scott,
Appellant

On Appeal from The United States District Court for the Eastern District of Pennsylvania
Civil No. 78-0062
Honorable Joseph L. McGlynn, Jr.

Submitted Pro Se July 17, 1986

Before: ADAMS, HIGGINBOTHAM, and MARIS, Circuit Judges

JUDGMENT ORDER

After considering the contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Each side to bear its own costs.

BY THE COURT,

s/Arlin M. Adams
Circuit Judge

ATTEST:

s/Sally Mrvos
Sally Mrvos, Clerk

DATED: Jul 24 1986

EXHIBIT G

APPENDIX as filed in above captioned case, PAGES 113 to 127 showing known SHAREHOLDERS of the derivative action company, LAVENDER HOUSE, INC.

F. L. Putnam & Co., Inc.
50 Congress Street
Boston, MA 02109

Philadep & Company
9th Floor, Stock Exchange Bldg.
17th Street & Stock Exchange Place
Philadelphia, PA 19103

Merrill Lynch, Pierce, Fenner & Smith,
Inc., P.O. Box 350 Church Street Station
New York, New York 10008

Thomson & McKinnon Auchincloss Kohlmeyer,
Inc., P.O. Box 198, Bowling Green Sta
New York, New York 10004

Becker Securities Corporation
First National Plaza
Chicago, Illinois 60670

Hayden Stone Inc.
1 Western Union International Plaza
New York, New York

Shearson American Express
Western Union International Plaza
New York, New York 10004

Michael Investment Co.
Boston Stock Exchange
Boston, Massachusetts 02108

Burke, Lawton & Company
P.O. Box 100
Flourtown, Pennsylvania 19031

W. F. Hutton & Company
14 Wall Street
New York, New York

Jenny Montgomery Scott Inc.
5 Penn Center Plaza
Philadelphia, Pennsylvania

F. D. Baroff Company, Inc.
New York, New York

E. F. Hutton & Company
One Battery Park Plaza
New York, New York 10019

Reynold Securities, Inc.
20 Broadway
New York, New York

P.S. & Company
15 Maiden Lane
New York, New York 10038

R T G & Company
1840 Mineral Spring Avenue
N. Providence, RI

Burham & Company
60 Broadway
New York, New York 10004

Park Securities, Inc.
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New York, New York 10038

Drexel Firestone Inc.
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New York, New York

Amherst Securities Corp.
New York, New York 10019

Harris, Upham & Company
New York, New York 10019

Elkins, Morris, Stroud & Company
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Philadelphia, Pennsylvania

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Philadelphia, PA - Attn: Mr. Kurts

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